

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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**APPLICATION TO CHANGE WATER RIGHT
NO. 76G 30154146 BY STATE OF MONTANA }
DEPARTMENT OF ENVIRONMENTAL }
QUALITY**

**PRELIMINARY DETERMINATION TO
GRANT TEMPORARY CHANGE**

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On March 9, 2022, the State of Montana Department of Environmental Quality (Applicant) submitted Application to Change Water Right No. 76G 30154146 to temporarily change Water Right Claim Nos. 76G 90497-00 and 76G 90498-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). On June 6, 2022, final processing of this application was transferred to the Central Office of the DNRC Water Rights Bureau in Helena. A pre-application meeting was held between the Department and the Applicant on November 10, 2021. The Department published receipt of the Application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated August 11, 2022. The Applicant responded with information dated November 3, 2022. The Application was determined to be correct and complete as of February 2, 2023. The Department met with the Applicant to discuss the application on July 28, 2022. An Environmental Assessment for this Application was completed on April 28, 2023.

APPLICATION INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change an Existing Irrigation Water Right, Form 606-IR
- Change to Instream Flow Addendum (Form 606-IFA)
- Change of Purpose Addendum (Form 606-PA)
- Temporary Change Addendum (Form 606-TCA)
- Attachments
 - August 2, 1966, aerial photo showing Water Resource Survey recorded acres, historic place of use, point of diversion, and ditch system for Claim Nos. 76G 90497-00 and 76G 90498-00

- July 30, 1977, aerial photo showing Water Resource Survey recorded acres, historic place of use, point of diversion, and ditch system for Claim Nos. 76G 90497-00 and 76G 90498-00
- October 2017 aerial photo showing proposed instream place of use, measurement point, and historic point of diversion
- Manning's Equation Ditch Capacity Calculation for Ditch No.1
- Historic Diverted Volume Calculation Spreadsheet for Claims 76G 90497-00 and 76G 90498-00
- Photos of Ditch No. 1 (9/7/2021) and Historic Place of Use (9/11/2021)

Information received after application filed:

- Response to Department Deficiency Letter from Applicant, received November 3, 2022
 - Revised Ditch Capacity Calculations for Ditch No. 1 (Headgate to Convergence with Alvi-Beck Ditch and Convergence with Alvi-Beck Ditch to Historic Place use)

Information within the Department's Possession/Knowledge

- Files for Statements of Claim 76G 90497-00 and 76G 90498-00
- DNRC Irrigation Change Application Technical Report, dated February 2, 2023
- DNRC Surface Water Change Report and Return Flow Analysis conducted by Jack Landers, DNRC Groundwater Hydrologist, dated February 2, 2023
- 1959 Powell County Water Resources Survey, maps, and field notes
- Upper Clark Fork River Basin Aquatic and Terrestrial Resources Restoration Plans (Natural Resource Damage Program, 2019)
- Upper Clark Fork River Flow Story (Upper Clark Fork River Basin Steering Committee, 2006)
- Endangered Species Act of 1973
- Montana Cadastral parcel and property information

The Department also routinely considers the following information. The following information is not included in the administrative file for these applications but is available upon request. Please contact the Water Rights Bureau Central Office at 406-444-9556 to request copies of the following documents.

- DNRC Return Flow Memo, dated April 1, 2016
- DNRC Change in Irrigation Method Policy Memo, dated December 2, 2015
- DNRC Historic Diverted Volume Standard Methods Memo, dated September 13, 2012

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, Chapter 2, Part 3, Part 4, MCA).

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Statement of Claim Nos. 76G 90497-00 and 76G 90498-00 are proposed to be changed in this application and are listed in Table 1. Claims 76G 90497-00 and 76G 90498-00 are filed irrigation rights that are entirely supplemental to one another and claim the same 85-acre place of use. There are no other water rights supplemental to those being changed. These water rights claim one point of diversion in the Clark Fork River, a dike located in the W2NWNW of Section 21, Township (T) 6 North (N) Range (R) 9 West (W) in Deer Lodge County. The claimed place of use for Claims 76G 90497-00 and 76G 90498-00 is 85 acres located in Section 16 in T6N, R9W, Powell County. Full legal land description of the place of use acres is shown in Table 1. The water rights being changed were included in the Preliminary Decree for Basin 76G issued May 17, 1985. The elements of the water rights proposed for change are shown below:

Table 1. Elements of Nos. 76G 90497-00 and 76G 90498-00:

WR Number	Purpose	Flow Rate	Period of Use	Point of Diversion	Place of Use	Priority Date	Claimed Acres
76G 90497-00	Irrigation	3.22 CFS	4/15-10/19	W2NWNW Sec. 21, T6N R9W	E2SW, NWSE, S2SWNE, SESESENW, E2SESWSW, NWNWSWSEN Sec. 16, T6N R9W	10/14/1937	85
76G 90498-00		5 CFS				6/6/1916	

2. The water rights being changed in this application are located in the Upper Clark Fork River Basin (Basin 76G) which is subject to a legislative water right basin closure.

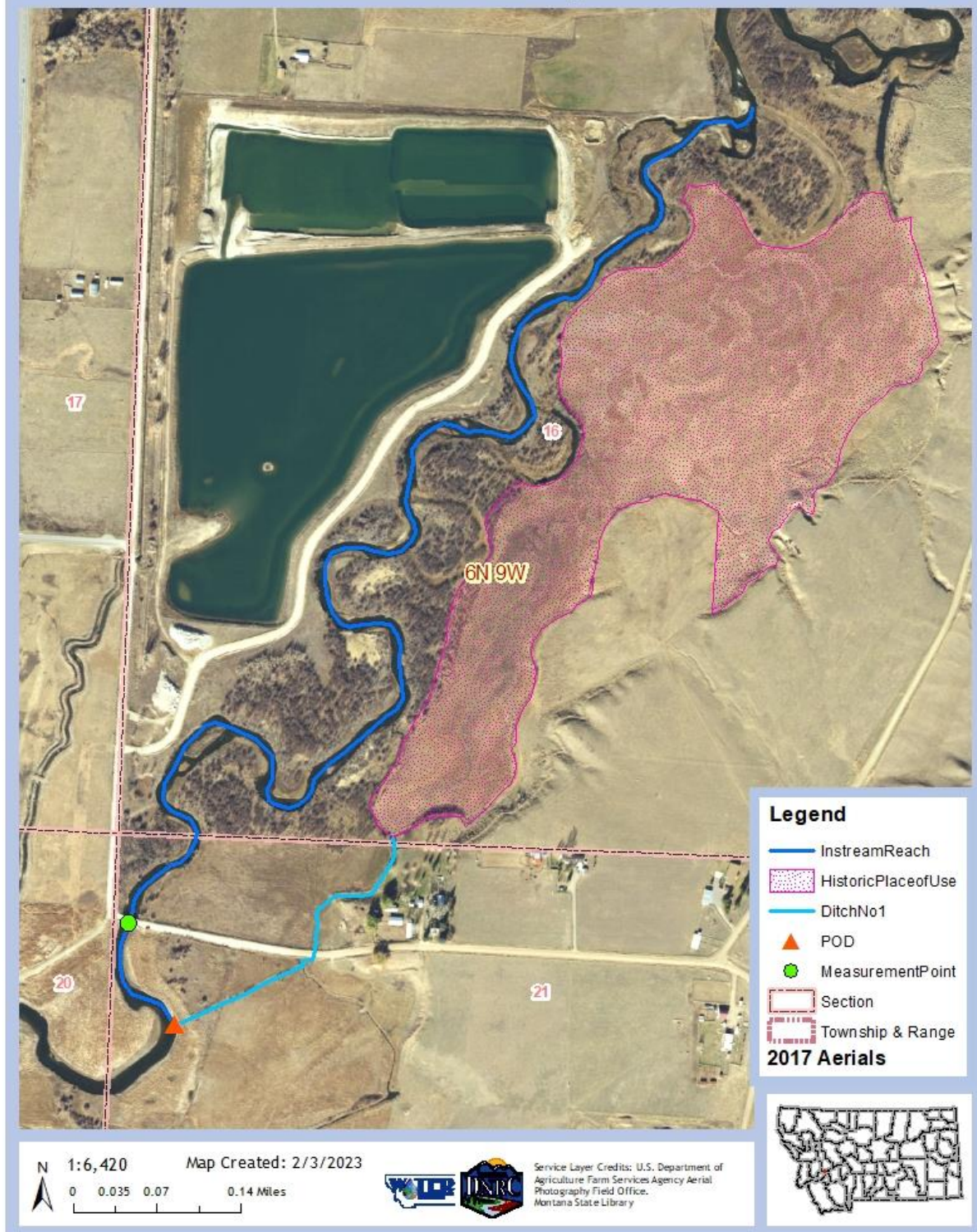
CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to temporarily change the purpose and place of use of Claims 76G 90497-00 and 76G 90498-00 from irrigation to instream flow for the benefit of the fishery resource in the Clark Fork River in Deer Lodge and Powell Counties for a period of 10 years with the option to renew. During the term of this proposed temporary change the 65-acre historically irrigated place of use will be retired from irrigation and a total flow rate and volume of up to 8.22 CFS and 264.4 acre-feet (AF) will be left instream using both water rights in the Clark Fork River.

The proposed instream period of use is July 15 to September 6. The proposed instream place of use extends 1.43 miles downstream from the historic point of diversion in the W2NWNW of Section 21, T6N R9W to the NWSWNE of Section 16, T6N R9W. During the term of this proposed temporary change a combined flow rate and volume of 8.22 CFS and 264.4 AF will be protected instream from the historic point of diversion at the Ditch No. 1 Headgate to the point where return flows historically accreted in the Clark Fork River in the SESWSW of Section 16, T6N R9W, and a combined flow rate and volume of 8.22 CFS and 66.3 AF will be protected instream from the point where return flows historically accreted to the end of the instream place of use. Map 1 shows the proposed elements of this change.

76G 90497-00 and 76G 90498-00 Historic and Proposed Instream Place of Use



Map 1. Historic Irrigation and Proposed Use for Claims 76G 90497-00 and 76G 90498-00

CHANGE CRITERIA

4. The Department is authorized to approve a temporary change if the applicant meets its burden to prove the applicable § 85-2-402, 407, and 408, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probable than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶ 8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(c) The proposed use of water is a beneficial use.

5. In addition to the § 85-2-402(2), MCA,¹ an applicant for a temporary change authorization for instream flow must comply with the requirements and conditions set forth in §§ 85-2-407 and -408, MCA. Section 85-2-408, MCA provides in part:

(1) The department shall accept and process an application for a temporary change in appropriation rights to maintain or enhance instream flow to benefit the fishery resource under the provisions of **85-2-402**, **85-2-407**, and this section.

The application must:

- (a) include specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced; and
- (b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.

(2) (a) A temporary change authorization under the provisions of this section is allowable only if the owner of the water right voluntarily agrees to:

(i) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery resource; or

(ii) lease a consumptive use water right to another person for instream flow to benefit the fishery resource.

(3) In addition to the requirements of **85-2-402** and **85-2-407**, an applicant for a change authorization under this section shall prove by a preponderance of evidence that:

¹Pursuant to §85-2-402 (2)(b) and -402(2)(d), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate and is not required to prove possessory interest in the place of use because this application involves a temporary change in appropriation right for instream flow pursuant to § 85-2-408 MCA.

- (a) the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons; and
- (b) the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource.

...

- (5) The department shall approve the method of measurement of the water to maintain and enhance instream flow to benefit the fishery resource through a temporary change authorization as provided in this section.

....

- (8) The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion.

6. Pursuant to §§ 85-2-407, and -408, MCA, a temporary change for authorization for instream flow is subject to special conditions which are identified above and addressed in the sections below. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶ 8.

HISTORIC USE

FINDINGS OF FACT

7. Claims 76G 90497-00 and 76G 90498-00 were historically used for the wild-flood irrigation of 65 acres in the SWSWNE, NWNWSE, NESW, W2SESW, and W2SESWSW of Section 16, T6N R9W. The Powell County Water Resources Survey from June 1959 depicted the irrigation of 32 acres in the historical place of use. Applicant-provided historic imagery dated August 2, 1966, depicts the irrigation of 65 acres. Based on this information, the Department finds a 65-acre historical irrigation place of use for both water rights being changed.

8. Claims 76G 90497-00 and 90498-00 were historically diverted at a headgate located in the W2NWNW of Section 16, T6N R9W and conveyed approximately 1400 feet to the historic place of use via an unnamed ditch hereafter referred to as "Ditch No. 1". Ditch No. 1 is comprised of two main segments that each conveyed volumes of water that were either partially (Leg 2) or entirely (Leg 1) diverted from the historic point of diversion. The first 625-foot segment (Leg 1) extends from the Ditch No. 1 point of diversion to the convergence of Ditch No. 1 with the end of the Alvi- Beck Ditch. The second 775-foot segment (Leg 2) extends from this convergence to the

point where Ditch No. 1 meets the historic place of use. The Applicant submitted dimensions for both Leg 1 and Leg 2 of Ditch No. 1, as well as a Manning's roughness calculation and *n* coefficient of 0.03 in the application materials that substantiate maximum historical ditch capacities of 13.7 CFS for Leg 1 and 24.3 CFS for Leg 2. These maximum historical ditch capacities corroborate the historic use of the full claimed flow rates for Claims 76G 90497-00 and 76G 90498-00. Based on this information, the Department finds the maximum historical flow rates for Claims 76G 90497-00 and 76G 90498-00 are 3.22 CFS and 5 CFS respectively, resulting in a combined historical flow rate of 8.22 CFS.

9. The claimed period of use for Claims 76G 90497-00 and 76G 90498-00 is April 15 to October 19. According to information submitted in the application materials, irrigation of the historical place of use began as early as April 1 and ended as late as November 19. The Applicant states that the senior Claim 76G 90498-00 was typically in use from April 20 to October 10, while junior Claim 76G 90497-00 was typically in use from May 1 to August 1. Historic consumptive use for 65 irrigated acres is calculated per ARM 36.12.1902(16). The Department considers an on-farm efficiency of 25% for wild flood irrigation (per DNRC memo: *Development of standardized methodologies to determine Historic Diverted Volume* dated September 13, 2012), a 1964-1973 historical management factor of 77.6%, and an evapotranspiration irrigation water requirement of 13.14 inches as measured at the Powell County weather station in Deer Lodge. The historic field application and consumptive use volumes for the entire 65-acre place of use, respectively, are 220.9 AF and 66.3 AF. The variables considered in this historic use assessment are summarized in Table 2.

Table 2. Historic consumed volume (HCV) and field application volume for the historical 65-acre wild flood-irrigated place of use:

Powell County Wild Flood ET	Historic (1964-1973) Management Factor, Powell County	Historically Flood Irrigated Acres	HCV (Excluding IL)	On- Farm Efficiency	Field Application	Historic Irrecoverable Losses (IL): Flood 5%	HCV (Including IL)
13.14 inches	77.6%	65 acres	55.2 AF	25%	220.9 AF	11 AF	66.3 AF

10. The portions of the total historic consumption and field application volumes attributed to each water right are calculated according to their proportions of their total combined flow rate (8.22 CFS) since both water rights were historically used while consumption was occurring. Based on this information, the Department finds the respective historic consumed and field application volumes attributed to both water rights being changed are 26 AF and 86.5 AF for Claim 76G

90497-00, and 40.3 AF and 134.4 AF for Claim 76G 90498-00. The details of this apportionment can be found in Table 3 below.

Table 3. Total historic consumed and field application volumes for Claim Nos. 76G 90497-00 and 76G 90498-00:

Water Right No.	Flow Rate	Percentage of Flow	Apportioned HCV (Including IL)	Apportioned Field Application Volume
76G 90497-00	3.22 CFS	39.2%	26 AF	86.5 AF
76G 90498-00	5.0 CFS	60.8%	40.3 AF	134.4 AF
Total	8.22 CFS	100%	66.3 AF	220.9 AF

11. According to information in the Applicant's response to the Department's Deficiency Letter, seasonal irrigation diversions into Ditch No. 1 typically began on April 20 and ended October 10. The Applicant states that diversions with the junior of the two water rights being changed (Claim No. 76G 90497-00) typically began on May 1 and that this water right fell out of priority around August 1 (93 days between 5/1 and 8/1), while senior Claim No. 76G 90498-00 was typically in use from April 20 until October 10 (174 days total, 81 days while junior Claim No. 76G 90497-00 was not in use). Table 4 below shows the Department-considered historic period of use for the purpose of evaluating conveyance losses in the shared Ditch No. 1.

Table 4. Claim Nos. 76G 90497-00 and 76G 90498-00's historic flow rates and periods of use:

Water Right No.	Priority Date	Flow Rate	Period of Use	Number of Days
76G 90497-00	10/14/1937	3.22 CFS	5/1-8/1	93
76G 90498-00	6/6/1916	5 CFS	4/20-10/10	174

12. Based on the information in FOFs 8 and 11, the Department calculated conveyance loss volumes separately for Legs 1 and 2 of Ditch No. 1, and calculated conveyance losses for each leg for the 93 days when both water rights were in use, and the 81 days when only Claim No. 76G 90498-00 was in use (resulting in four conveyance loss calculations). According to the Applicant's response to the Department's Deficiency Letter, a flow rate of 1 CFS of wastewater originating in the Alvi-Beck Ditch system historically dumped into Ditch No. 1. This wastewater is accounted for in the conveyance loss calculations for Leg 2. The four calculations for the conveyance loss scenarios are found in Tables 5-10. Each of the four calculations for the conveyance loss scenarios are made up of three components (letter as indicated in Tables 5-10): seepage loss (A), vegetation loss (B), and ditch evaporation (C):

Seasonal Conveyance Loss

$$= \text{Seepage Loss}^A + \text{Vegetation Loss}^B + \text{Ditch Evaporation}^C, \text{ in which:}$$

$$\text{Seepage Loss}^A = \frac{\text{wetted perimeter} \times \text{ditch length} \times \text{ditch loss rate} \times \text{days}}{43,560 \text{ ft}^2/\text{acre}},$$

$$\text{Vegetation Loss}^B = \left(\% \frac{\text{loss}}{\text{mile}} \right) \times \text{flow rate} \times \text{days} \times \text{ditch length} \times 2 \text{ (unit conversion constant),}$$

$$\text{Ditch Evaporation}^C = \frac{\text{ditch surface area} \times \text{evaporation rate}}{43,560 \text{ ft}^2/\text{acre}}.$$

Table 5. Conveyance losses for Ditch No. 1 (Leg 1) (May 1 to August 1, both water rights in use, no Alvi-Beck Ditch wastewater)

^A Seepage Loss	Ditch Wetted Perimeter (ft)	Ditch Length (ft)	Ditch Loss Rate (ft ³ /ft ² /day)	Days Irrigated	Seepage Loss (AF)
	5.37	625	1.4	93	10.0
^B Vegetation Loss	% Loss/Mile	Historic Flow Rate (CFS)	Days Irrigated	Ditch Length (mi)	Vegetation Loss (x2) (AF)
	0.0075	8.22	93	0.12	1.4
^C Ditch Evaporation	Ditch Width (ft)	Ditch Length (ft)	Period Adjusted Evaporation Factor (ft)	Ditch Evaporation (AF)	Seasonal Conveyance Loss (AF) (A+B+C)
	4.32	625	1.48	0.1	11.5

Table 6. Conveyance losses for Ditch No. 1 (Leg 2) (May 1 to August 1, both water rights in use and Alvi-Beck Ditch wastewater present)

^A Seepage Loss	Ditch Wetted Perimeter (ft)	Ditch Length (ft)	Ditch Loss Rate (ft ³ /ft ² /day)	Days Irrigated	Seepage Loss (AF)
	5.91	775	1.4	93	13.7
^B Vegetation Loss	% Loss/Mile	Historic Flow Rate (CFS)	Days Irrigated	Ditch Length (mi)	Vegetation Loss (x2) (AF)
	0.0075	9.22	93	0.15	1.9
^C Ditch Evaporation	Ditch Width (ft)	Ditch Length (ft)	Period Adjusted Evaporation Factor (ft)	Ditch Evaporation (AF)	Seasonal Conveyance Loss (AF) (A+B+C)
	4.86	775	1.48	0.1	15.7

Table 7. Conveyance losses for Ditch No. 1 (Leg 1) (April 20 – April 30 and August 2- October 10, Claim No. 76G 90498-00 only)

^A Seepage Loss	Ditch Wetted Perimeter (ft)	Ditch Length (ft)	Ditch Loss Rate (ft ³ /ft ² /day)	Days Irrigated	Seepage Loss (AF)
	4.54	625	1.4	81	7.4
^B Vegetation Loss	% Loss/Mile	Historic Flow Rate (CFS)	Days Irrigated	Ditch Length (mi)	Vegetation Loss (x2) (AF)
	0.0075	5	81	0.12	0.7
^C Ditch Evaporation	Ditch Width (ft)	Ditch Length (ft)	Period Adjusted Evaporation Factor (ft)	Ditch Evaporation (AF)	Seasonal Conveyance Loss (AF) (A+B+C)
	3.85	625	1.29	0.1	8.2

Table 8. Conveyance losses for Ditch No. 1 (Leg 2) (April 20 – April 30 and August 2- October 10, Alvi-Beck Ditch wastewater present and Claim No. 76G 90498-00 only)

^A Seepage Loss	Ditch Wetted Perimeter (ft)	Ditch Length (ft)	Ditch Loss Rate (ft ³ /ft ² /day)	Days Irrigated	Seepage Loss (AF)
	5.29	775	1.4	81	10.7
^B Vegetation Loss	% Loss/Mile	Historic Flow Rate (CFS)	Days Irrigated	Ditch Length (mi)	Vegetation Loss (x2) (AF)
	0.0075	6	81	0.15	1.1
^C Ditch Evaporation	Ditch Width (ft)	Ditch Length (ft)	Period Adjusted Evaporation Factor (ft)	Ditch Evaporation (AF)	Seasonal Conveyance Loss (AF) (A+B+C)
	4.57	775	1.29	0.1	11.8

Table 9. Summary of Conveyance Loss (CL) Volumes of Claim Nos. 76G 90497-00, 76G 90498-00, and Alvi-Beck Wastewater Apportioned by Water Right

Period of Use	Number of Days	Ditch No. 1 Leg	Water Right Number	Flow Rate	Conveyance Loss Volume (by Leg)	% of Flow	CL Volume (by WR)
4/20 – 4/30 and 8/2 – 10/10	81	1	76G 90497-00	-	8.2 AF	0%	0 AF
			76G 90498-00	5 CFS		100%	8.2 AF
		2	76G 90497-00	-	11.8 AF	0%	0 AF
			76G 90498-00	5 CFS		83.3%	9.8 AF
			Alvi-Beck Wastewater	1 CFS		16.7%	2.0 AF
5/1 – 8/1	93	1	76G 90497-00	3.22 CFS	11.5 AF	39.2%	4.5 AF
			76G 90498-00	5 CFS		60.8%	7.0 AF
		2	76G 90497-00	3.22 CFS	15.7 AF	34.9%	5.5 AF
			76G 90498-00	5 CFS		54.2%	8.5 AF
			Alvi-Beck Wastewater	1 CFS		10.9%	1.7 AF

Table 10. Total Conveyance Loss Volume for Claim Nos. 76G 90497-00, 76G 90498-00, and Alvi-Beck Wastewater Apportioned by Water Right

Water Right Number	76G 90497-00	76G 90498-00	Alvi-Beck Wastewater
Total Apportioned Conveyance Loss Volume	10.0 AF	33.5 AF	3.7 AF
Percent of Total Conveyance Loss Volume	21.2%	71%	7.8%

13. According to the standards in ARM 36.12.1902(10), historical diverted volume is equal to the sum of the field application volume and volume of conveyance losses. In considering the calculated conveyance losses and field application volume, the total historic diverted volume associated with the two water rights being changed is calculated as 220.9 AF Historical Field Application Volume + 43.5 AF Historical Conveyance Losses = 264.4 AF. Table 11 summarizes the Department's findings for the portions of the Applicant's total 264.4-AF historical diverted volume and 220.9-AF historical field application volume that are attributable to Claims 76G 90497-00 and 76G 90498-00.

Table 11. Summary of historic use findings for Claim Nos. 76G 90497-00 and 76G 90498-00

Water Right No.	Flow Rate	Field Application Apportionment	Apportioned Field Application Volume	Apportioned Conveyance Loss Volume	Apportioned HDV
76G 90497-00	3.22 CFS	39.2%	86.6 AF	10.0 AF	96.6 AF
76G 90498-00	5 CFS	60.8%	134.3 AF	33.5 AF	167.8 AF
Total	8.22 CFS	100%	220.9 AF	43.5 AF	264.4 AF

ADVERSE EFFECT

FINDINGS OF FACT

14. During the term of the temporary change, the Applicant will discontinue all diversions of irrigation water into Ditch No.1, and 65 acres in Section 16, T6N R9W will be retired from irrigation. The historically diverted flow rate of 8.22 CFS and volume of 264.4 AF of both water rights being changed will be appropriated instream in a 1.3-mile reach of the Clark Fork River for the benefit of the fishery resource. The proposed period of use is July 15 to September 6 (54 days).

15. The receiving streams for return flows and location of return flow accretion were modeled and identified by DNRC Groundwater Hydrologist Jack Landers in a Surface Water Change Report completed on February 2, 2023. Receiving streams for return flows are determined by proximity to and evidence of hydraulic connection to groundwater which generally do not depend on groundwater flow or land slope. The assumption is made that water applied for irrigation that is not consumed by a crop infiltrates to groundwater becoming return flow and does not run off. The amount of water not consumed is the difference between the amount of water consumed and the amount of water applied to a field.

16. For purposes of this Preliminary Determination, a return flow analysis was performed to determine whether return flows resulting from historical irrigation with the water rights being changed entered back into the Clark Fork River prior to or at the location of the next downstream appropriator (see Department Policy Memorandum on Return Flows, dated April 1, 2016). This policy directs that no further return flow analysis will be undertaken in the source of supply by the Department unless a valid objection is received, provided there will be no enlargement of the amounts of water historically diverted or consumed. A volume of 43.5 AF of return flows associated with the 65-acre historic place of use were modeled by the Department to have historically accreted in the Clark Fork River near the upstream extent of the Applicant's place of use in the SESWSW of Section 16, T6N R9W. In this instance, the Department finds that there will be no enlargement of Claims 76G 90497-00 and 76G 90498-00 as a result of the proposed temporary change since historically irrigated acres are being retired and the new instream appropriation is non-consumptive.

17. After this change, the historical diverted volume of 264.4 AF will be temporarily appropriated instream with both water rights from the beginning of the instream place of use in

the SWNWNW Section 21, T6N R9W to the point where return flows historically accreted in the Clark Fork River in the SESWSW of Section 16, T6N R9W. From the point where return flows historically accreted to the end of the instream place of use in the NWSWNE of Section 16, T6N R9W, the maximum volume of water that may be protected instream is equal to the historically consumed volume of 66.3 AF.

18. No other water rights share Ditch No.1 or the Ditch No. 1 Headgate with Claims 76G 90497-00 and 76G 90498-00. There is one other water right (76G 90510-00) with a point of diversion within the proposed 1.3-mile instream place of use (upstream of the point of historical return flow accretion, and therefore could not have historically relied on return flows) that is also owned by the Applicant. Claim 76G 90510-00 does not list Ditch No. 1 as a means of conveyance and is junior to both water rights being changed. The Department finds this water right will not be adversely affected by this temporary change because historically diverted and non-consumed volumes of water associated with the water rights proposed for change were not historically available upstream of the point where return flows accreted to the Clark Fork River. The elements of the water right located within the proposed instream place of use are listed in Table 12 below.

Table 12. Water right within the proposed instream place of use:

Water Right No.	Owner	Priority Date	Flow Rate	Point of Diversion	Period of Use	Purpose
76G 90510-00	Montana, State Dept of Environmental Quality	4/15/1954	6.25 CFS	SWSWSW Sec. 16, T6N R9W	4/15-10/19	Irrigation

19. Streamflows will be monitored through measurement at USGS Stream Gage 12323800 Clark Fork near Galen, MT on a biweekly (every other week) basis during the period of use (July 15 to September 6). Additional measurements will be collected manually on a minimum biweekly basis in the Clark Fork River at the Gemback Road Bridge once streamflows measured at the USGS stream gage reach 60 CFS. This stream gage is the closest real- time stream gage to the historic point of diversion, located approximately 8.1 miles upstream of the beginning of the instream place of use. Between the historic point of diversion and USGS Gage 12323800 there are approximately 151 CFS of legal diversionary water uses (not including water rights without a quantified flow rate). According to modern flow monitoring conducted by the Applicant during the proposed period of use, actual intervening diversions between the gage and the historical point of diversion generally do not exceed approximately 50 CFS. Thus, when streamflows at USGS Gage 12323800 reach 60 CFS, 10 CFS is estimated to remain instream at the beginning of the instream place of use. Based on this information, the Department considers USGS Stream Gage

12323800 an acceptable initial point of streamflow measurement. This application will be subject to the following measurement condition:

BETWEEN JULY 15 AND SEPTEMBER 6, THE APPROPRIATOR WILL LEAVE UP TO 8.22 CFS AND 264.4 AF INSTREAM WITH STATEMENT OF CLAIM NOS. 76G 90497-00 AND 76G 90498-00 TO ENHANCE STREAMFLOWS FOR THE BENEFIT OF THE FISHERY RESOURCE IN THE CLARK FORK RIVER. STREAMFLOWS AS MEASURED AT USGS GAGE NO. 12323800 CLARK FORK NEAR GALEN, MT WILL BE OBSERVED BY THE APPROPRIATOR BIWEEKLY BEGINNING JULY 15. WHEN STREAMFLOWS AT USGS GAGE NO. 12323800 REACH 60 CFS THE APPROPRIATOR WILL BEGIN MANUALLY COLLECTING STREAMFLOWS WITH A DEPARTMENT APPROVED METHOD AT GEMBACK ROAD BRIDGE BIWEEKLY. THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER APPROPRIATED INSTREAM. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR TO THE HELENA REGIONAL OFFICE UNTIL A PROJECT COMPLETION NOTICE IS RECEIVED BY THE DEPARTMENT, AND UPON REQUEST THEREAFTER. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THIS CHANGE.

20. The Department may approve a change in appropriation right if the Applicant proves by a preponderance of evidence that the proposed change will not adversely affect the use of existing water rights pursuant to § 85-2-402(2)(a), MCA. In addition, the Applicant must demonstrate that “the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons.” § 85-2-408(3)(a), MCA. If any water right holder believes they will be adversely affected by a change in timing and the amount of return flows resulting from this proposal, they may file an objection to the proposed project pursuant to §§ 85-2-307(3), and -308, MCA. Based on its analysis and guidance provided by policy, the Department preliminarily finds that the changes to return flows resulting from the proposed change will not cause an adverse effect to other water users.

21. The Department finds there will be no adverse effect from the proposed changes under the terms and conditions set out in this Preliminary Determination.

BENEFICIAL USE

FINDINGS OF FACT

22. The Applicant proposes to temporarily change the purpose and place of use of Claims 76G 90497-00 and 76G 90498-00 to instream flow to enhance streamflows for the benefit of the fishery resource in the Clark Fork River. The entire historically irrigated 65-acre place of use will be retired during the term of this temporary change. The proposed instream place of use consists of the 1.3-mile reach of the Clark Fork River extending from the Ditch No. 1 Headgate to Galen

Road Bridge. The total volume available to be appropriated instream is 264.4 AF with Claims 76G 90497-00 (96.6 AF) and 76G 90498-00 (167.8 AF).

23. The Upper Clark Fork River Basin is categorized as “Chronically Dewatered” by the Montana Department of Fish, Wildlife and Parks (FWP). FWP established a minimum recommended flow rate of 40 CFS and a target flow of 180 CFS in their 1986 Water Reservation for the Clark Fork River from Galen to Deer Lodge. The Applicant refers to further research in the *Upper Clark Fork River Flow Story* (2006) by the Upper Clark Fork River Basin Steering Committee and the *Upper Clark Fork River Basin Aquatic and Terrestrial Resources Restoration Plans* completed by the Natural Resource Damage Program (2019) which confirm a minimum recommended flow for this section of river of 40 CFS. This section of river is currently designated as critical habitat for Bull Trout by the US Fish and Wildlife Service. Increased instream flow will contribute to the creation of more suitable habitat to meet the needs of the Endangered Species Act requirements and Montana FWP’s minimum recommended flow rate for this section of the Clark Fork River.

24. The Applicant will begin monitoring streamflows at USGS Stream Gage 12323800 Clark Fork near Galen at the beginning of the proposed period of use (July 15) on a biweekly basis. The Applicant will begin manually collecting streamflows in the Clark Fork River at the Gemback Road Bridge on a minimum biweekly basis when streamflows measured at the USGS stream gage reach 60 CFS.

25. Pursuant to § 85-2-102(5)(d), MCA, the use of a water right through a temporary change or lease to enhance instream flows to benefit a fishery resource in accordance with § 85-2-408, MCA, is considered a beneficial use of water. The Department finds the proposed temporary appropriation of 8.22 CFS up to a volume of 264.4 AF for the purpose of enhancing and augmenting streamflows for the benefit of the fishery resource in the instream place of use in the Clark Fork River to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

26. The proposed temporary change of Claims 76G 90497-00 and 76G 90498-00 is to maintain and enhance streamflows to benefit the resident trout fishery of the Clark Fork River and does not require a means of diversion or conveyance. Per § 85-2-402(2)(b)(ii), MCA, a temporary change in appropriation right for instream flow pursuant to § 85-2-408, MCA, is exempt from the adequacy of diversion criterion.

POSSESSORY INTEREST

FINDINGS OF FACT

27. Pursuant to § 85-2-402(2)(d)(ii), MCA, the Applicant is not required to prove that they have a possessory interest, or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use because this application involves a temporary change in appropriation right for instream flow per § 85-2-408, MCA.

TEMPORARY PROTECTED REACH/ MEASUREMENT PLAN

FINDINGS OF FACT

28. The Applicant is proposing to temporarily change the purpose and place of use of Claims 76G 90497-00 76G 90498-00 to instream flow for the benefit of the fishery resource in the Clark Fork River for a period of 10 years with the option to renew. During the term of this temporary change the entire 65-acre historical place of use will be retired from irrigation. After this change, the Applicant will appropriate 8.22 CFS in the proposed 1.3-mile instream place of use in the Clark Fork River, which will extend from the historic point of diversion in the W2NWNW of Section 21, T6N R9W, to the NWSWNE of Section 16, T6N R9W. The proposed period of use is July 15 to September 6. The volume available to be appropriated instream from the beginning of the instream place of use to the point where return flows historically accreted in the Clark Fork River (SESWSW of Section 16, T6N R9W) is equal to the historically diverted volume of 264.4 AF; below the point at which return flows historically accreted in the Clark Fork River to the end of the instream place of use, the volume available to be appropriated instream is 66.3 AF, which is equal to the historically consumed volume.

29. The Applicant will monitor flow rates and volumes appropriated for the instream flow purpose using the real-time USGS Stream Gage 12323800 Clark Fork near Galen, MT every two weeks during the proposed period of use (July 15 to September 6). When streamflows at the USGS stream gage reach 60 CFS, the Applicant will begin manually collecting streamflows at the end of the instream reach Galen Road Bridge on a biweekly basis. Annual measurement reports will be submitted to the Central Office of the Water Resources Division's Water Rights Bureau by November 30 of each year until a Project Completion Notice (Form 618) is received by the Department, and upon request thereafter.

30. The Department finds the Applicant has met the additional criteria for a temporary change in appropriation right to maintain or enhance instream flow to benefit a fishery resource under the provisions of § 85-2-408, MCA.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

31. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied)).

32. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

33. The cornerstone of evaluating potential adverse effect to other appropriators is the

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff's subsequent right).

determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶¶44-45

34. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others.

35. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731.

36. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986.

37. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

38. The Department has adopted rules providing for the calculation of historic diverted and consumptive volumes where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16). In the alternative an applicant may present their own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF Nos. 7-13).

39. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the combined historic use of Water Right Claims 76G 90497-00 (3.22 CFS and 96.6 AF) and 76G 90498-00 (5.0 CFS and 167.8 AF) to be 264.4 AF diverted volume and 8.22 CFS with a combined consumptive use of 66.3 AF. (FOF Nos. 7-13)

40. The Applicant established that the change authorization will be operated in a manner that ensures the amount of water protected instream does not exceed the maximum volume and flow rate during the period of use for the change authorization. Furthermore, the Applicant identified the reach in which instream flows will be protected and provided a detailed measurement plan to ensure that, as conditioned, the change authorization is operated in compliance with § 85-2-408(1) and (8), MCA. (FOF Nos.14-21).

41. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. § 85-2-402(2)(b), MCA. (FOF Nos. 14-21)

BENEFICIAL USE

42. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA. ARM 36.12.1801. Where the proposed beneficial use is instream flow to enhance the fishery resource, an applicant must prove that that amount of water proposed for change is needed to maintain or enhance instream flows to benefit the fishery resource. Section 85-2-408(3)(b), MCA.

43. The Applicant proposes to use water for instream flow which is a recognized beneficial use of water. § 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence instream flow is a beneficial use and that 424.3 AF and 6.0 CFS of water requested is the amount needed to sustain the instream flow beneficial use and are within the standards set by DNRC Rule. § 85-2-402(2)(c), MCA (FOF Nos. 22-25).

TEMPORARY PROTECTED REACH/MEASUREMENT PLAN

44. For a change in appropriation right to maintain or enhance instream flow to benefit the fishery resource, an applicant must “(a) include specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced; and... (b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.” § 85-2-408(1), MCA.

45. The Department has determined that the Applicant may protect 264.4 AF of historically diverted water at a flow rate of 8.22 CFS from the historical point of diversion in the W2NWNW of Section 21, T6N R9W in Deer Lodge County, to the NWSWNE of Section 16, T6N R9W, Powell County. The Department concludes the length and location of the stream reach in which instream flows will be maintained and enhanced along with the measurement plan satisfy the additional requirements of § 85-2-408(1), MCA. (FOF Nos. 28-30).

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right Nos. 76G 90497-00 and 76G 90498-00 should be granted subject to the following.

The Department authorizes the Applicant to temporarily change the purpose and place of use of Statement of Claim Nos. 76G 90497-00 and 76G 90498-00 from irrigation to instream flow for the benefit of the fishery resource in the Clark Fork River for a period of up to 10 years. During the term of this temporary change the entire 65-acre historical place of use will be retired from irrigation. The post-change period of use is July 15 to September 6. The instream place of use in the Clark Fork River extends from the historical point of diversion at the Ditch No. 1 headgate in the W2NWNW of Section 21, T6N R9W to the NWSWNE of Section 16, T6N R9W. The maximum flow rate and volume that may be appropriated instream from the beginning of the instream place of use to the point where return flows historically accreted in the Clark Fork River in the SESWSW of Section 16, T6N R9W cannot exceed the historically diverted flow rate and volume of 8.22 CFS and 264.4 AF (3.22 CFS and 96.6 AF with Claim 76G 90497-00, and 5 CFS and 168.7 AF with Claim 76G 90498-00). From the point where return flows historically accreted to the end of the instream place of use in the NWSWNE of Section 16, T6N R9W, the maximum volume of water that may be appropriated instream is equal to the historically consumed volume of 66.3 AF with both water rights being changed (26 AF with Claim 76G 90497-00 and 40.3 AF with Claim 76G 90498-00).

This application will be subject to the following condition:

MEASUREMENT CONDITION

BETWEEN JULY 15 AND SEPTEMBER 6, THE APPROPRIATOR WILL LEAVE UP TO 8.22 CFS AND 264.4 AF INSTREAM WITH STATEMENT OF CLAIM NOS. 76G 90497-00 AND 76G 90498-00 TO ENHANCE STREAMFLOWS FOR THE BENEFIT OF THE FISHERY RESOURCE IN THE CLARK FORK RIVER. STREAMFLOWS AS MEASURED AT USGS GAGE NO. 12323800 CLARK FORK NEAR GALEN, MT WILL BE OBSERVED BY THE APPROPRIATOR BIWEEKLY BEGINNING JULY 15. WHEN STREAMFLOWS AT USGS GAGE NO. 12323800 REACH 60 CFS THE APPROPRIATOR WILL BEGIN MANUALLY COLLECTING STREAMFLOWS WITH A DEPARTMENT APPROVED METHOD AT GEMBACK ROAD BRIDGE BIWEEKLY. THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER APPROPRIATED INSTREAM. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR TO THE HELENA REGIONAL OFFICE UNTIL A PROJECT COMPLETION NOTICE IS RECEIVED BY THE DEPARTMENT, AND UPON REQUEST THEREAFTER. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THIS CHANGE.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§ 85-2-310, -312, MCA.

Dated this 17th of May, 2023.

/Original signed by Nathaniel Ward/
Nathaniel Ward, Water Rights Bureau Chief
Water Rights Bureau Central Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 17th of May 2023, by first class United States mail.

STATE OF MONTANA
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